

CLERK'S OFFICE U.S. DISTRICT COURT  
AT ROANOKE VA. - FILED

AUG 14 2009

BY: *[Signature]* JOHN F. GORCORAN, CLERK  
DEPUTY CLERK

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outstanding criminal warrants. Then, police took him back to his parents' house, where other officers were already executing a search warrant. They seized guns and drugs from the residence. Some of Smiley's charges involved drugs seized from the house during that search. Smiley allegedly asked his attorney to file a motion to suppress the seized evidence. The attorney, however, advised Smiley to accept a plea bargain that resulted in fewer charges being brought against him.

On the face of his § 2254 petition, Smiley states that he pleaded guilty, that he did not appeal, and that he has never filed a petition in any court concerning these convictions.

### **DISCUSSION**

Under 28 U.S.C. § 2254(b), a federal court cannot grant a habeas petition unless the petitioner has exhausted the remedies available in the courts of the state in which he was convicted. The exhaustion requirement is satisfied by seeking review of the claims in the highest state court with jurisdiction to consider the claims. In Virginia, a non-death row inmate can exhaust his state remedies as to an ineffective assistance claim in one of two ways. First, he can file a state habeas petition with the Circuit Court where he was convicted, with an appeal of an adverse decision to the Supreme Court of Virginia. Va. Code § 8.01-654. Second, he can exhaust his remedies by filing a state habeas petition directly with the Supreme Court of Virginia. Id. Whichever route the inmate chooses to follow, it is clear that he must ultimately present his claims to the Supreme Court of Virginia and receive a ruling from that court before a federal district court can consider them under § 2254. See O'Sullivan v. Boerckel, 526 U.S. 828, 845 (1999).

In this case, it is undisputed that Smiley's present claims have not been adjudicated by the Supreme Court of Virginia. Therefore, he has failed to fully exhaust available state court remedies, as required by 28 U.S.C. § 2254(b). For this reason, Smiley's petition must be dismissed without prejudice.<sup>2</sup>

The Clerk is directed to send copies of this memorandum opinion and accompanying order to petitioner.

ENTER: This 12<sup>th</sup> day of August, 2009.



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United States District Judge

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<sup>2</sup> The petitioner may refile his federal habeas petition if he is still unsuccessful in obtaining relief after presenting his claims to the Supreme Court of Virginia. The petitioner is advised, however, that the time for filing a state or federal habeas petition is limited. See 28 U.S.C. § 2244(d); Virginia Code § 8.01-654(A)(2).